

1 Complaint") (#1). The Complaint asserts eight counts which describe
2 various ways that IGT officers and directors allegedly breached
3 their fiduciary duties and were unjustly enriched during the period
4 from November 2007 to the present.¹ At the heart of Plaintiffs'
5 Complaint is the allegation that certain IGT senior officers made
6 intentionally misleading public statements about the bright
7 financial prospects of IGT, and that at least some of them
8 benefitted from selling their own stock in IGT at inflated prices.
9 In fact, Plaintiffs allege, the officers were mismanaging the
10 company, so that the prospects for the future were not bright at
11 all. The IGT Board of Directors, meanwhile, allegedly failed to
12 oversee adequately the work of the officers and the performance of
13 the company, failed to take action to terminate the officers for
14 cause, and even rewarded one of them in particular, the former CEO,
15 with a revised employment contract providing a large salary and
16 bonus.

17 A previous consolidated shareholder derivative action based on
18 essentially identical allegations was filed in this Court on
19 December 11, 2009. Fosbre v. Matthews, No. 3:09-cv-00467, 2010 WL
20 2696615 (D. Nev. July 2, 2010). This Court dismissed that action

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22 ¹ The eight counts include the following: (1) "Against the
23 Individual Defendants for Breaches of Fiduciary Duty For Improper
24 Financial Reporting"; (2) "Against the Insider Selling Defendants for
25 Breach of Fiduciary Duties for Insider Selling and Misappropriation
26 of Information"; (3) "Against All Individual Defendants for Breach of
27 Fiduciary Duty"; (4) "Against All Defendants for Unjust Enrichment";
(5) "Against Miller, Hart, Matthews, Mathewson, Burt, and Bittman for
Corporate Waste"; (6) "Against Matthews and Cavanaugh For Violation
of §10(b) of the Exchange Act and SEC Rule 10b-5 Promulgated
Thereunder"; (7) "Against Miller, Hart, Mathewson, Burt, and Bittman
For Violation of §20a of the Exchange Act"; and (8) "Against Matthews
For Violation of § 20(A) of the Exchange Act."

1 based on a failure to show demand futility. Id. Despite being
2 given leave to amend, an amended complaint was never filed, and
3 judgment was entered in favor of Defendants.

4 In this action, IGT filed a Motion to Dismiss (#6) on April 19,
5 2011, arguing that this action must be dismissed in its entirety
6 because demand futility was previously litigated in favor of
7 Defendants in Fosbre, and because Plaintiff has not shown that
8 demand is futile, nor has he shown that the contemporaneous
9 ownership requirement to sue has been satisfied. On June 17, 2011,
10 Plaintiff filed his opposition (#31). On July 8, 2011, IGT replied
11 (#32).

12 13 **II. Motion to Dismiss Standard**

14 A motion to dismiss under Federal Rule of Civil Procedure
15 12(b)(6) will only be granted if the complaint fails to "state a
16 claim to relief that is plausible on its face." Bell Atl. Corp. v.
17 Twombly, 550 U.S. 544, 570 (2007); see also Ashcroft v. Iqbal, 129
18 S. Ct. 1937, 1953 (2009) (clarifying that Twombly applies to
19 pleadings in "all civil actions"). On a motion to dismiss, except
20 where a heightened pleading standard applies, "we presum[e] that
21 general allegations embrace those specific facts that are necessary
22 to support the claim." Lujan v. Defenders of Wildlife, 504 U.S. 555,
23 561 (1992) (quoting Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 889
24 (1990)) (alteration in original); see also Erickson v. Pardus, 551
25 U.S. 89, 93 (2007) (noting that "[s]pecific facts are not necessary;
26 the statement need only give the defendant fair notice of what the .
27 . . claim is and the grounds upon which it rests.") (internal

1 quotation marks omitted). Moreover, "[a]ll allegations of material
2 fact in the complaint are taken as true and construed in the light
3 most favorable to the non-moving party." In re Stac Elecs. Sec.
4 Litig., 89 F.3d 1399, 1403 (9th Cir. 1996) (citation omitted).

5 Although courts generally assume the facts alleged are true,
6 courts do not "assume the truth of legal conclusions merely because
7 they are cast in the form of factual allegations." W. Mining Council
8 v. Watt, 643 F.2d 618, 624 (9th Cir. 1981). Accordingly,
9 "[c]onclusory allegations and unwarranted inferences are
10 insufficient to defeat a motion to dismiss." In re Stac Elecs., 89
11 F.3d at 1403 (citation omitted).

12 Review on a motion pursuant to Fed. R. Civ. P. 12(b)(6) is
13 normally limited to the complaint itself. See Lee v. City of L.A.,
14 250 F.3d 668, 688 (9th Cir. 2001). If the district court relies on
15 materials outside the pleadings in making its ruling, it must treat
16 the motion to dismiss as one for summary judgment and give the non-
17 moving party an opportunity to respond. Fed. R. Civ. P. 12(d);
18 see United States v. Ritchie, 342 F.3d 903, 907 (9th Cir. 2003). "A
19 court may, however, consider certain materials – documents attached
20 to the complaint, documents incorporated by reference in the
21 complaint, or matters of judicial notice – without converting the
22 motion to dismiss into a motion for summary judgment." Ritchie, 342
23 F.3d at 908.

24 If documents are physically attached to the complaint, then a
25 court may consider them if their "authenticity is not contested" and
26 "the plaintiff's complaint necessarily relies on them." Lee, 250
27 F.3d at 688 (citation, internal quotations, and ellipsis omitted).

1 A court may also treat certain documents as incorporated by
2 reference into the plaintiff's complaint if the complaint "refers
3 extensively to the document or the document forms the basis of the
4 plaintiff's claim." Ritchie, 342 F.3d at 908. Finally, if
5 adjudicative facts or matters of public record meet the requirements
6 of Fed. R. Evid. 201, a court may judicially notice them in deciding
7 a motion to dismiss. Id. at 909; see FED. R. EVID. 201(b) ("A
8 judicially noticed fact must be one not subject to reasonable
9 dispute in that it is either (1) generally known within the
10 territorial jurisdiction of the trial court or (2) capable of
11 accurate and ready determination by resort to sources whose accuracy
12 cannot reasonably be questioned.").

13 14 **III. Discussion**

15 Under Federal Rule of Civil Procedure 23.1, a shareholder
16 seeking to vindicate the interests of a corporation through a
17 derivative suit must first demand action from the corporation's
18 directors or plead with particularity the reasons why such a demand
19 would have been futile. FED. R. CIV. P. 23.1(b)(3). All of
20 Plaintiff's claims in this lawsuit are derivative, requiring a
21 demand on IGT's board or a particularized showing of demand
22 futility. It is undisputed that Plaintiff made no demand on IGT's
23 board.

24 IGT argues that this action must be dismissed because demand
25 futility was previously litigated in favor of Defendants in the
26 consolidated shareholder derivative suit which was based on nearly
27 identical allegations and for the same relevant period following
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1 November 2007. Fosbre v. Matthews, No. 3:09-cv-00467, 2010 WL
2 2696615 (D. Nev. July 2, 2010)². In Fosbre, we found that the
3 plaintiffs had failed to show demand futility, and granted leave to
4 amend, but the case was dismissed after no amended complaint was
5 filed. Id.

6 In Nevada, four factors must be satisfied for issue preclusion:

7 '(1) the issue decided in the prior litigation must be
8 identical to the issue presented in the current action;
9 (2) the initial ruling must have been on the merits and
10 have become final; ... (3) the party against whom the
judgment is asserted must have been a party or in
privity with a party to the prior litigation'; and (4)
the issue was actually and necessarily litigated.

11 Five Star Capital Corp. v. Ruby, 194 P.3d 709, 713 (Nev. 2008)
12 (quoting Univ. of Nev. v. Tarkanian, 879 P.2d 1180, 1191 (Nev.
13 1994)).

14 With respect to the first factor, demand futility was squarely
15 at issue and Plaintiff's reasons for failing to make a demand on the
16 board are essentially the same in this action, or any additional
17 reasons could have been raised in the previous action. With respect
18 to the second factor, courts have found that the demand futility
19 issue is final and on the merits. See, e.g., In re Sonus Networks,
20 Inc., S'holder Derivative Litig., 499 F.3d 47, 59-60 (1st Cir.

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22 ² Each of the individual defendants named in this case were
23 defendants in Fosbre. While four of the eight directors serving on the
24 board of directors at the time this action was filed were not serving
at the time of Fosbre, the new directors all joined IGT in 2010 and
are not named defendants in this action. Six of the directors had not
25 even joined IGT during the challenged events. Because we decide this
case on the basis of issue preclusion, we do not delve into the merits
26 of demand futility, as that issue was amply dealt with in Fosbre, but
we predict that such an analysis would lead to the same conclusion
27 despite the slightly different allegations brought by Plaintiff in
this case.

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1 2007); LeBoyer v. Greenspan, No. CV 03-5603-GHK (JTLx), 2007 WL
2 4287646, at *3 (C.D. Cal. June 13, 2007). With respect to the third
3 factor, plaintiffs in a shareholder derivative action represent the
4 corporation, and therefore the question of whether demand on the
5 board of directors would have been futile is an issue that is the
6 same no matter which shareholder serves as plaintiff. In re Sonus,
7 499 F.3d at 64. The fourth factor is satisfied as well. This Court
8 received extensive briefing and issued a detailed order on the issue
9 of demand futility in Fosbre.

10 Plaintiff argues that issue preclusion does not apply here
11 because Plaintiff has additional or different factual allegations
12 than those raised in Fosbre. The fact that the Fosbre plaintiffs did
13 not plead "every possible cause of action or include every possible
14 time period or defendant does not alter the central issue-whether
15 demand on [defendants] would have been futile." In re Bed Bath &
16 Beyond Inc. Derivative Litig., No. 06-cv-5107, 2007 WL 4165389, at
17 *6 (D.N.J. Nov. 19, 2007). Nor do Plaintiff's arguments that he has
18 allegations specific to the demand futility issue that are different
19 from the allegations brought up in Fosbre preclude our use of issue
20 preclusion.³ "Facts excusing a failure to make demand that could
21 have been pleaded in the first complaint, or by amendment before
22 dismissal, should be barred" because "a party who has litigated an

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24 ³ Nor do we find compelling Plaintiff's argument that our ruling
25 in a securities class action involving IGT necessitates a different
26 result in this case. See Int'l Broth. of Elec. Workers Local 697
27 Pension Fund v. International Game Tech. et al., No. 3:09-cv-419-ECR-
28 RAM, 2011 WL 915115 (D. Nev. Mar. 15, 2011). Our ruling did not relate
in any way to the issue of demand futility in a shareholder derivative
case.

1 ultimate fact may not bring forward different evidentiary facts in
2 order to relitigate the finding." In re Sonus, 499 F.3d at 63.

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4 **IV. Conclusion**

5 Plaintiff's complaint must be dismissed because Plaintiff has
6 failed to make a demand on the board of directors, and the issue of
7 demand futility was fully litigated in favor of defendants in a
8 previous shareholder derivative case based on the same allegations.

9 **IT IS, THEREFORE, HEREBY ORDERED** that IGT's Motion to Dismiss
10 (#6) is **GRANTED**.

11 The Clerk shall enter judgment accordingly.

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14 DATED: March 14, 2012.

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16 UNITED STATES DISTRICT JUDGE